



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 16, 2004

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Legal and Compliance Division  
Texas Department of Insurance  
P. O. Box 149104  
Austin, Texas 78714-9104

OR2004-4912

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 203480.

The Texas Department of Insurance (the "department") received two requests for the calendar year 2003 annual report submitted to the department by each viatical and life settlement company licensed to do business in the State. You state that the department will release some of the information to the requestors. You indicate that the department takes no position regarding the release of the submitted information. You contend, however, that release of the submitted information may implicate the proprietary interests of third parties. You state, and provide documentation showing, that you notified Life Equity, L.L.C. ("Life Equity"); Coventry First, L.L.C. ("Coventry"); Extended Life Services, Inc. ("Extended Life"); and Legacy Benefits Corporation ("Legacy") of the requests and of their rights to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances).

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as

to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Extended Life has not submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Therefore, Extended Life has provided us with no basis to conclude that it has protected proprietary interests in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Life Equity, Coventry, and Legacy have each submitted comments contending that information contained in their respective 2003 annual life and viatical settlement company reports is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the submitted information and the arguments submitted by Life Equity and Legacy, we find that Life Equity and Legacy have made *prima facie* cases that their 2003 annual life and viatical settlement company reports are protected as trade secret information. Moreover, we have received no arguments that would rebut these claims as a matter of law. Thus, the department must withhold Life Equity’s and Legacy’s 2003 annual life and viatical settlement company reports pursuant to section 552.110(a).

Upon review of the submitted information and arguments submitted by Coventry, we find that Coventry has not shown that its 2003 annual life and viatical settlement company report

meets the definition of trade secret information nor has it demonstrated the factors necessary to establish a trade secret claim. However, we find that Coventry has established that the pricing information contained in its report constitutes commercial or financial information the release of which would cause the company harm; we therefore conclude that such information is excepted from disclosure under section 552.110(b). Therefore, the department must withhold the pricing information contained in Coventry's annual life and viatical settlement company report, which we have marked, pursuant to section 552.110(b).<sup>1</sup>

In summary, the department must withhold Life Equity's and Legacy's 2003 annual life and viatical settlement company reports pursuant to section 552.110(a). The department must withhold the pricing information contained in Coventry's 2003 annual life and viatical settlement company report, which we have marked, pursuant to section 552.110(b). All remaining submitted information must be released to the requestors.<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

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<sup>1</sup>We note that Coventry is one of the two requestors in this case. As such, Coventry is entitled to a copy of its own 2003 annual life and viatical settlement company report and the department must release a copy of Coventry's report to Coventry.

<sup>2</sup>As we are able to resolve this issue under section 552.110(a) with regard to Life Equity's and Legacy's claims, we need not address their additional arguments against disclosure.

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/krl

Ref: ID# 203480

Enc. Submitted documents

c: Mr. Kerry L. Childe  
Associate General Counsel  
Life Partners, Inc.  
P. O. Box 20034  
Waco, Texas 76702  
(w/o enclosures)

Ms. Janis Hoelzle  
Coventry First, L.L.P.  
7111 Valley Green Road  
Fort Washington, PA 19034  
(w/o enclosures)

Mr. Brian Smith  
Life Equity, L.L.P.  
85 Executive Parkway, Suite 100  
Hudson, OH 44236-1691  
(w/o enclosures)

Mr. Mark H. Robinson  
Jones Day  
P. O. Box 660623  
Dallas, Texas 75266-0623  
(w/o enclosures)

Scott Peden  
Extended Life Services, Inc.  
P. O. Box 20034  
Waco, Texas 76702  
(w/o enclosures)

Meir Eliav  
Legacy Benefits Corporation  
350 5<sup>th</sup> Avenue, Suite 4320  
New York, NY 10118  
(w/o enclosures)